

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

95 JUN -6 PM 3:12
DIST OF SOUTH CAROLINA

IN RE:

Rodwell Pontiac Cadillac GMC Truck, Inc.,
Debtor.

Kevin Campbell, Trustee,
Plaintiff,

v.

The Estate of Terry Cumbee,
Defendant.

C/A No. 93-71381 -

Adv. Pro. No. 94-8261

ENTERED

JUN 07 1995

JUDGMENT

R. S. S

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order
of the Court, judgment shall be entered in favor of the Defendant.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
June 6, 1995.

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ORDER

Chapter 7

THIS MATTER comes before the Court upon an Adversary Proceeding Complaint filed by Kevin Campbell, the Chapter 7 Trustee for the above Debtor (hereinafter referred to as the "Trustee"), seeking to recover certain payments made within ninety (90) days by Rodwell Pontiac Cadillac GMC Truck, Inc. (hereinafter referred to as the "Debtor") to Terry Cumbee (hereinafter referred to as the "Decedent") as preferential transfers pursuant to 11 U.S.C. §547(b)¹. Mr. Cumbee passed away on or about May 1, 1994 and the Trustee seeks to recover these payments from the Estate of Terry Cumbee (hereinafter referred to as "the Defendant").

The Defendant answered, denying that the payments the Decedent received constituted

¹ Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et. seq.*, shall be by section number only.

gw - 1 -

preferences. Among other defenses, the Defendant alleged that the payments did not enable this creditor to receive more than such creditor would have received in this Chapter 7 case if the transfer had not been made pursuant to § 547(b)(5).

Having considered the evidence, pleadings, the exhibits admitted at trial, the pre-trial Joint Stipulation and the testimony of the Trustee, David W. Rodwell, Jr., the president of the Debtor (hereinafter referred to as "Mr. Rodwell"); Holly Cumbee, the personal representative and wife of the Decedent (hereinafter referred to as "Ms. Cumbee"); and Christian J. Fuse of Grand Strand Appraisals, Inc. (hereinafter referred to as "Mr. Fuse"); the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On January 8, 1993, the Debtor executed a promissory note (hereinafter "Note") in favor of the Decedent in the amount of Thirty-Seven Thousand Three Hundred Seventy-Eight and 00/100 (\$37,378.00) Dollars.
2. By its terms, the Note was payable in full on February 16, 1993, with no interest to accrue.
3. This Note was secured by a real estate mortgage (hereinafter "Mortgage"), which was properly recorded and filed on January 8, 1993, with the Clerk of Court for the County of Georgetown, State of South Carolina. Pursuant to that Mortgage, the Decedent held a second priority lien mortgage on certain parcels of property in Georgetown County, South Carolina, identified as tax map numbers TMS #5-30-39, #5-30-41 through #5-30-47 (inclusive), TMS #5-30-50 and #5-30-52, and TMS #5-30-40.2 (all hereinafter referred to as the "Real Property", "Subject Property" or "Collateral"). Peoples Federal

ju - 2 -

Savings and Loan Association (hereinafter "Peoples Federal") held a first mortgage on all parcels except the parcel #5-30-40.2, upon which NationsBank of South Carolina, N.A. (hereinafter "NationsBank") held a first mortgage. NationsBank also held a mortgage on parcel TMS #5-30-40. People's Federal was owed \$430,738.99 plus interest, attorney fees and costs on the date the Debtor filed for Chapter 11 relief. NationsBank was owed \$105,768.58 plus interest, attorney fees and costs on the date the Debtor filed for Chapter 11 relief.

4. The Debtor made a first payment to the Decedent on February 8, 1993, in the amount of Ten Thousand and 00/100 (\$10,000.00) Dollars from the Debtor's general operating account.
5. The Debtor made a second and final payment to the Decedent on February 24, 1993, in the amount of Twenty-Seven Thousand Six Hundred and 00/100 (\$27,600.00) Dollars, paid through a check drawn by Carolina First Bank, representing funds which originated from check #0111 to Carolina First Bank from an account entitled "Rodwell-Beary Pontiac Cadillac GMC Truck".
6. The total amount paid by the Debtor to the Decedent was \$220.00 more than required by the terms of the Note.
7. On March 11, 1993, the Debtor filed for relief under Chapter 11 of the United States Bankruptcy Code.
8. On April 7, 1993, the Decedent's second Mortgage was satisfied of record in the office of the Clerk of Court for the County of Georgetown, State of South Carolina.
9. On November 1, 1993, the case converted to one under Chapter 7 of the United States

ju-3 -

Bankruptcy Code.

10. On November 4, 1993, Plaintiff Kevin Campbell was appointed to serve as the Chapter 7 Trustee and continues to serve in that capacity.
11. The Real Property owned by the Debtor was valued at Seven Hundred Thousand and 00/100 (\$700,000.00) Dollars on its Bankruptcy Schedule A. The Schedule identifies the property as 407 St. James Street, Georgetown, South Carolina, which is comprised of TMS #5-30-39; TMS #5-30-40; TMS #5-30-40.1; TMS #5-30-40.2; TMS #5-30-41 to 47 (inclusive); TMS #5-30-49; and TMS #5-30-50 and 52. The Bankruptcy Schedule does not itemize the value of each parcel which comprises 407 St. James Street.
12. On June 7, 1993, Peoples Federal sought and obtained relief from the Automatic Stay to allow it to foreclose on its mortgage. A Judgment of Foreclosure and Order of Sale was entered on May 16, 1994. Peoples Federal purchased the four parcels of property foreclosed upon, (TMS #5-30-39; TMS #5-30-41 to 47 (inclusive); TMS #5-30-50 and #5-30-52; and TMS #5-30-40.1), on June 6, 1994 for Two Hundred Ninety Thousand and 00/100 (\$290,000.00) Dollars. Parcels TMS #5-30-40 and #5-30-40.2 were not involved in the Peoples Federal foreclosure. The Master's Deed to Peoples Federal was filed on June 21, 1994. On June 21, 1994, after the granting of relief from the stay, the Debtor sold parcels #5-30-40 and #5-30-40.2, parcels on which NationsBank had a first mortgage, for \$10.00 and assumption of a NationsBank mortgage which had a balance then of \$115,026.37.
13. The Parties have stipulated and the Court finds that both payments to the Decedent on the Note given in his favor were transfers of an interest of the Debtor in property, both

JW 4

payments to the Decedent were to or for the benefit of a creditor, both payments were for or on account of an antecedent debt owed by the Debtor before such transfers were made, and both payments to the Decedent were made on or within 90 days before the date of the filing of the petition.

14. There will be no distribution to either priority or unsecured creditors from the liquidation of the Debtor's assets. The only source of a potential distribution to priority creditors is from several pending preference actions, which, even if full recovery is obtained, would not provide a 100% distribution to unsecured creditors.

CONCLUSIONS OF LAW

Pursuant to 11 U.S.C. § 547, a Trustee may recover, for the benefit of the estate, pre-petition transfers which are avoidable preferences. This section provides in part:

- (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property --
 - (1) to or for the benefit of a creditor;
 - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
 - (3) made while the debtor was insolvent;
 - (4) made --
 - (A) on or within 90 days before the date of the filing of the petition; ...
 - (5) that enables such creditor to receive more than such creditor would receive if --
 - (A) the case were a case under chapter 7 of this title ...;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title ...

Pursuant to § 547(g), the Trustee has the burden of proving the avoidability of the

JW - 5 -

transfers under § 547(b) by a preponderance of the evidence, which is "synonymous with the term 'greater weight of evidence'". In re Virginia Carolina Financial Corp., 954 F.2d 193, 196 (4th Cir. 1992), Anderson v. Little Tikes, Inc., (In re Southco, Inc.), Bankruptcy Case No. 91-05576, Adv. Pro. No. 92-8221 (WTB June 7, 1993) citing Glinka v. Bank of Vermont (In re Kelton Motors, Inc.), 130 B.R. 170, 174 (Bankr. D.Vt. 1991).

The Defendant has stipulated that the Trustee has met his burden of proof as to elements one (1) through four (4) of § 547(b). Therefore, this Court shall focus only upon element five (5).²

Section 547(b)(5) permits a trustee to avoid any transfer that enables a creditor to receive more than it would receive if the case were a Chapter 7 case and the transfer had not been made (if the other requirements of § 547(b) are met). This provision requires the Bankruptcy Court to "construct a 'hypothetical chapter 7 case;' i.e. to determine what the creditor would have received in a liquidation." In re Chattanooga Wholesale Antiques, Inc., 930 F.2d 458, 464 (6th Cir.1991).

"As the plain language of § 547(b)(5) conveys, the Court must focus . . . upon whether the creditor would have received less than a 100% payout in a Chapter 7 liquidation." In re Virginia Carolina Financial Corp., 954 F.2d 193, 199 (4th Cir. 1992). "This interpretation reflects the common sense notion that a creditor need not return a sum received from the debtor

² The Defendant's Answer raised the Ordinary Course of Business defense pursuant to § 547(c)(2) and raised the application of § 547(c)(1) in its Motion for Summary Judgment. The exceptions contained in § 547(c) are affirmative defenses and must be pled as such. Since the Defendant did not raise § 547(c)(1) in its Answer and did not move to amend its pleadings during the proceedings of this case, this Court considers the only affirmative defense raised by the Defendant to be § 547(c)(2). The Defendant bears the burden of establishing the elements of this defense. No testimony was offered regarding the "ordinary course of business" defense and thus this Court finds that this defense was not established.

ju-6-

prior to bankruptcy if the creditor is no better off vis-a-vis the other creditors of the bankruptcy estate than he or she would have been had the creditor waited for liquidation and distribution of the assets of the estate." Id. In this case, the Decedent was paid in full pre-petition as a secured creditor based on a value of his collateral being sufficient to satisfy his Mortgage in full. If the value of the collateral property was actually less, such that its value after the date of the petition would not be sufficient to cover the Decedent's second Mortgage, then the Decedent would have received more towards his claim through the pre-petition payment than he would have in a Chapter 7 liquidation and thus would have received a preferential transfer to the extent. Therefore, the essential question for the Court in this case is the value of the collateral property both pre-petition and post-petition.

The Court must determine value on a case by case basis, and is not bound by any one particular valuation method. In this instant case there are many indicators of value, including the assessed tax value, foreclosure value, sale value, appraised fair market value for §362 purposes, and values prescribed in the Debtor's Schedules and through testimony at trial by the Trustee, the Debtor's principal, and an Appraiser. None of these indicators of value are particularly convincing of the value of the Subject Property on the petition date in this case.³

The Defendant asserts that the proper valuation method to determine whether the Defendant would have been secured on the date of the petition should be fair market value. The Trustee takes the position that, based upon the literal meaning of § 547(b)(5), liquidation value is

³ The parties stipulated that the appropriate time for testing the preferential effect of a payment, or the proper date when a hypothetical Chapter 7 liquidation must be made, is the date on which the bankruptcy petition was filed. The critical date in this case, therefore, and when a hypothetical Chapter 7 liquidation must be made, is March 11, 1993.

ju-7-

the appropriate valuation method and that to determine liquidation value, this Court must conduct a two-part test. First, the Court would have to determine the amount actually received by the Defendant if the transfers are not avoided. Second, the Court would then determine what amount the Defendant would have received through the liquidation of the Debtor's assets if the transfers had not been made. In re International Diamond Exchange Jewelers, Inc., 177 B.R. 265 (Bankr. W.D.OH 1995). This Court agrees that the appropriate valuation method for §547(b)(5) purposes would be a determination of liquidation value.

Under the first prong of this liquidation test, the Trustee does not apparently dispute that prior to the petition date in this case the collateral property had a fair market value sufficient to satisfy the Decedent's Mortgage in full. There was no contention or evidence to indicate that the value of the Real Property prior to the petition date was any less than the value prescribed in the Schedules. Therefore, this Court determines that the Decedent was fully secured prior to the petition date and would retain the total amount of the transfers which would equal \$37,600.00 if the transfers were not avoided.

As to the second prong of this test, the Court must also place a valuation post-petition upon the Real Property which had secured the Note and Mortgage to determine what amount the Defendant would have received through its liquidation in the Chapter 7 case.⁴ In this preference action, the Trustee has asserted that the value of the property as of the petition date does not

⁴In this Chapter 7 bankruptcy case, the Decedent would still receive the value of the property to the extent it exceeded the payoff of the respective first mortgages either through a sale of the property or through an abandonment and sale/foreclosure/payoff. Any deficiency above the value of the property would then be an unsecured claim against the bankruptcy estate which would not be paid in full in this case.

allow the Decedent to be fully secured. In support of his argument, the Trustee testified that in his opinion, the liquidation value of the Real Property as of March 11, 1993 was \$405,036.00, a value less than the debt owed on the respective first mortgages. This opinion was based primarily on the fact that parcels TMS #5-30-39, #5-30-41 to 5-30-47 (inclusive), #5-30-50 and 5-30-52, and #5-30-40.1 were sold at a properly conducted foreclosure sale on June 6, 1994 for \$290,000.00 to People's Federal (which immediately assigned the bid to a third party), as well as the fact that parcels TMS #5-30-40.2 and #5-30-40, subject to the NationsBank mortgage, were sold by the Debtor to a third party on June 21, 1994 for Ten Dollars (\$10.00) and the assumption of the NationsBank mortgage, which had a balance on that date of \$115,026.37.

The Trustee testified that while he never physically viewed the Debtor's properties, he was familiar with the Debtor's Bankruptcy Schedules (which noted property values of Seven Hundred Thousand and 00/100 (\$700,000.00) Dollars and secured claims of Six Hundred Twenty-Seven Thousand and 00/100 (\$627,000.00) Dollars), generally reviewed realtors' reports, took into consideration the subsequent foreclosure/sale amounts received for the properties, and spoke with several of the creditors of the estate regarding properties of the estate. The Trustee further asserted that in order to value the Subject Property for liquidation purposes, it was necessary to deduct 20-25% from any fair market appraisal value due to the stigma created by the bankruptcy of the property owner, and to deduct the costs of the sale, which would be an additional 10% for real estate commissions and 3% for the Trustee's commission. He testified that it was his opinion, as a bankruptcy trustee, that after the within case converted to a Chapter 7 on November 1, 1993, there was no equity in the subject property above the first mortgage liens and therefore the Decedent's Mortgage was completely unsecured.

ju-9-

The Trustee also argues that generally the scheduled values of estate property are not determinative on the issue of value which can be obtained in a Chapter 7 liquidation, especially where there is an actual disposition of the property within a relatively short period of time after the filing of the case. In re Miller & Rhoads, Inc., 146 B.R. 950 (Bankr.E.D.Va. 1992); In re W.L. Mead, Inc., 70 B.R. 651 (Bankr.W.D.Oh.1986).

The Trustee argues that the actual amounts received by the secured creditors in exercising their rights to liquidate the collateral during the Chapter 7 is the proper method to determine liquidation value on the date of the petition citing In re Ebbler Furniture and Appliances, Inc., 804 F.2d 87 (7th Cir.1986) and In re Missionary Baptist Foundation of America, Inc., 796 F.2d 752 (5th Cir.1986). However, this Court notes that in Ebbler Furniture, the collateralized property was disposed of shortly after the filing of the Chapter 7 petition. Furthermore, for several months preceding the filing of the Chapter 7 petition, the Debtor in Ebbler Furniture had conducted a liquidation sale of its inventory. In such a scenario, this Court would agree with the argument that the actual amounts received by the secured creditors would be the best indication of liquidation value. However, such a scenario was not present in the instant case.

The Trustee also relies upon the Fifth Circuit's Missionary Baptist Foundation opinion for this same proposition. However, in Missionary Baptist Foundation, the subject property was accounts receivable, another type of property whose value can fluctuate greatly with the mere passage of time. In that case, the Court recognized the need to examine the individual facts surrounding the particular property at issue and, finding that no adequate conclusions were reached by the lower courts, remanded the issue.

The Ebbler Furniture and Missionary Baptist Foundation opinions both cite the law

jw-10-

review article by Professor Cohen titled "Value" Judgments: Accounts Receivable Financing and Voidable Preferences Under the New Bankruptcy Code, 66 Minn.L.Rev. 639 (1982). In that article, Professor Cohen argues that courts, in determining value of property for insolvency purposes, should look at the actual manner in which the collateral was liquidated to determine the value of the collateral 90 days prior to the filing of the bankruptcy petition and that a Trustee may use the subsequent disposition of collateral which takes place within a reasonable period of time after the commencement of a Chapter 7 to determine the actual liquidation value of the property on the date of the petition. While this approach has some logical merit, it is important to note that Professor Cohen's approach is based upon a disposition of collateral within a reasonable period of time after the commencement of the bankruptcy case.

This Court agrees that through a consideration of the manner and timeliness of the disposition of collateral after the petition date, if reasonable, the Court may find assistance in its determination of how much, if any, liquidation value might differ from pre-petition fair market value. However, this Court does not believe that the value received at a foreclosure sale or other distress sale which takes place some long period after the petition date should be deemed as conclusive or even strongly indicative of liquidation value on the petition date. Likewise, adopting a rule which for purposes of § 547(b)(5) automatically places a standard 20-25% discount in the market value of property due to the "stigma" associated with a bankruptcy case is unreasonable in this Court's view.

In the within proceeding, the Trustee strongly relies upon the values paid at the foreclosure sale and sale for the assumption of mortgage, which both occurred during the Chapter 7 case in June of 1994, approximately 15 months after the date of the petition. In this Court's

JW -11 -

view, these sales are not sufficiently conclusive of Chapter 7 liquidation value on the petition date as contemplated by § 547(b)(5) of the Bankruptcy Code.

In refuting the Trustee's testimony as to the value of the property in this case, the Defendant presented evidence of an Appraisal of a portion of the property, parcels #5-30-40 and #5-30-40.2, that was performed within nine (9) months of the Decedent's Note and Mortgage. The Appraisal, which was dated April 30, 1992 was conducted by C.J. Fuse, III, S.R.A., a certified real estate Appraiser, of Grand Strand Appraisers, Inc. for Ms. Carol Jayroe of Citizens and Southern National Bank (later to become NationsBank) on parcels #5-30-40 and 5-30-40.2 collectively.⁵ As of April 30, 1992, this Appraisal establishes that the fair market value of parcels #5-30-40 and #5-30-40.2, collectively⁶, was One Hundred Fifty Thousand and 00/100 (\$150,000.00) Dollars. Additionally, Mr. David W. Rodwell, Jr. testified on behalf of the Defendant. Mr. Rodwell, as principal of the Debtor, testified that in his opinion as owner of the property at issue, parcels #5-30-40 and #5-30-40.2, had a value immediately prior to the petition date which exceeded the appraised value of One Hundred Fifty Thousand and 00/100 (\$150,000.00) Dollars by approximately Twenty-five Thousand and 00/100 (\$25,000.00) Dollars, or a total value of One Hundred Seventy-five Thousand and 00/100 (\$175,000.00) Dollars.

⁵ The Decedent held a second mortgage on Parcel TMS #5-30-40.2, with NationsBank holding a first mortgage.

⁶ The two lots measured 100 x 150 MOL and were collectively appraised at Ten and 00/100 (\$10.00) Dollars per square foot on April 30, 1992. Parcel TMS #5-30-40.2 is approximately Three Thousand Seven Hundred Sixty-Three and One-Half (3763.5) square feet.

JW -12 -

Even if this Court were to consider the Trustee's proffered liquidation values of the Debtors' property, the Defendant offered the most convincing proof as to a value of parcels #5-30-40 and #5-30-40.2. After deducting from the value of \$175,000.00 a total of 13% for costs of liquidation sale (the combined real estate and trustee commissions as testified by the Trustee), the net value of parcels #5-30-40 and #5-30-40.2 would be \$152,250.00, if the property had been liquidated on or immediately prior to March 11, 1993. NationsBank held a first mortgage on parcels #5-30-40 and #5-30-40.2 in the amount of \$105,768.58. Deducting \$105,768.58 from the "value" of the property of \$152,250.00 would leave \$46,481.42. Pursuant to this analysis, the value of these parcels alone would have fully secured the Defendant's claim and thus defeat the Trustee's preference recovery.

CONCLUSION

The Trustee bears the burden of establishing that the payments received by the Decedent pursuant to the terms of the Note and Mortgage enabled him to receive more than he would have received in Chapter 7 liquidation. Although this Court respects the Trustee's opinion testimony of value,⁷ this Court is unwilling to accept that the proffered amounts are conclusive of the value of the Debtor's property on March 11, 1993, for purposes of a hypothetical Chapter 7 liquidation and § 547(b) recovery. This Court believes that the greater weight of the credible evidence indicates that the subject property had a liquidation value as of the petition date which was

⁷ This Court does not propose to question the Trustee's decision to abandon any property of the Debtor in the Chapter 7 case. The Court simply finds that for purposes of the hypothetical Chapter 7 liquidation analysis which must be conducted as of March 11, 1993, the values obtained for the properties on a much later date are not sufficiently persuasive so as to set the value on March 11, 1993.

sufficient to fully secure the Mortgage claim held then by the Defendant. It is therefore the finding of the Court that the Trustee has not met this burden of proof and it is,

ORDERED, that judgment be entered in favor of the Defendant, The Estate of Terry Cumbee.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
June 6, 1995.